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IN THE

Supreme Court of the United States

DECEMBER TERM, 1967

HENRY HAROLD HOGUE,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

SAMUEL D. HEWLETT, JR.
1005 Healey Building
Atlanta, Georgia 30303

Attorney for Petitioner

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IN THE

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DECEMBER TERM, 1967

HENRY HAROLD HOGUE,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioner, Henry Harold Hogue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia, entered in the case of *Southern Railway Co. v. Henry Harold Hogue,* No. 42869, on June 28, 1967, motion for a rehearing denied on July 14, 1967, in that Court. Petition for certiorari to the Supreme Court of Georgia was filed on August 9, 1967 and denied by that Court on September 7, 1967, without an opinion.

OPINIONS BELOW

The opinion of the Superior Court of Fulton County,

Georgia appears as Appendix A and at pp. 120 of the record before the Court of Appeals. The opinion of the Court of Appeals of Georgia appears herein as Appendix B and at pp. 135 of the record.

JURISDICTION

The judgment of the Court of Appeals of Georgia was dated and entered on June 28, 1967 (R. 142). A timely petition for rehearing was denied July 14, 1967 (Appendix B). Petition for certiorari to the Supreme Court of Georgia was timely filed on August 9, 1967 and denied on September 7, 1967, (R. 153), filed of record in the Court of Appeals on September 21, 1967. A stay of the issuance of the mandate of the Court of Appeals of Georgia was granted on application by petitioner for time to apply for certiorari to the Supreme Court of the United States, (R. 156). This Court's jurisdiction is invoked under 28 U.S.C.A. 1257 (3) and Rule 19-1A of this Court. The basis of jurisdiction in the Superior Court of Fulton County, Georgia, was 45 U.S.C. 51 et sequa of the Federal Employer's Liability Act.

QUESTIONS PRESENTED

- 1 -

In an action under 45 U.S.C. 51, et sequa of the Federal Employer's Liability Act where the carrier sets up a signed release by the employee as a defense, can the employee attack the release on the ground of mistake of fact and fraud, without first tendering back the money paid under the release.

Does not the decision of the Court of Appeals of Georgia deprive petitioner of his property rights under the

Fourteenth Amendment of the Federal Constitution since such a decision deprives him of his right of action (a property right) which was specifically granted to him under a Federal Statute (45 U.S.C. 51, et seq.)?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment of the Federal Constitution and provisions of the Federal Employer's Liability Act 35 Stat. 65 (1908) as amended, 45 U.S.C. 51 et sequa. The pertinent provisions being set out as Appendix "C."

STATEMENT

The State Court Federal Employer's Liability Act Suit. On June 22, 1963, Henry Harold Hogue was employed by respondent Southern Railway Company to perform work on its trains and was injured while working in its shops in the furtherance of interstate commerce. He sued Southern Railway Company under the Federal Employer's Liability Act in the Superior Court of Fulton County, Georgia (R. 5).

To this suit, Southern Railway Company filed an answer, demurrers and a plea in bar setting forth a release given to respondent and signed by petitioner (R. 18, 22, 27, 34, 39, 108, 118).

Petitioner amended his action (R. 25, 47, 110) and filed an answer to the pleas in bar (R. 52), setting forth that the release was obtained by reason of a mistake of fact of both parties as to the extent of petitioner's injuries and alleging that petitioner and respondent had relied on the assurances of the carrier's doctor that he had

only a bruised knee and was not permanently injured, whereas later it was determined that his injury was permanent and resulted in his having two operations, one of which caused him to lose his knee cap.

Petitioner alleged that under Federal law a release given under such circumstances was not a bar to his action, but the amount paid as consideration under such release would be deducted from any recovery, made by petitioner and credited to defendant.

Respondent filed demurrers to petitioner's petition as amended (R. 108, 118), such demurrers were overruled and a motion for summary judgment by respondent Railroad as to its plea in bar (R. 44) was denied (R. 120) by the trial court.

Respondent appealed to the Court of Appeals of Georgia alleging that the trial court erred in overruling its demurrers and in denying its motion for summary judgment and argued that petitioner's action could not be maintained because petitioner had failed to tender back the consideration of the release, and thus petitioner's action was barred.

Thereafter, the Court of Appeals of Georgia reversed the trial court holding that in an employee's action under Federal Employer's Liability Act, a release entered into between the employer and employee could not be attacked by the employee for mutual mistake unless the employee tendered back the consideration for the release (R. 135).

Petitioner's motion for a rehearing was denied (R. 150) and petitioner applied to the Supreme Court of Georgia for a writ of certiorari (R. 152) which was denied (R. 153).

REASONS FOR GRANTING THE WRIT

This case involves Federally Created Rights under the Federal Employer's Liability Act, and it is of great public importance that the Supreme Court construe and decide the questions raised in this petition since there is no *direct* ruling by this Court on the question. The opinion of the Court of Appeals of Georgia, in effect, states that since the question has never been decided by this Court, they will decide the question under Georgia law. This question could, and probably will, arise in courts throughout the entire United States, and should be decided by the Supreme Court of the United States since rights of railroad employees are jeopardized and the cases from different state courts are in conflict.

This Court stated in *Duncan v. Thompson*, 315 U.S. 1 (2 of opinion), 86 L.Ed. 575, 62 S.Ct. 422, that a contract between a carrier and its employee, requiring the return of consideration paid under the contract before suit could be filed and maintained was a contract, the purpose and intent of which was to enable the employer to exempt itself from liability under the Federal Employer's Liability Act, and therefore was to that extent void.

In *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312, this Court held that Federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not properly interposed to suits under the Act.

Petitioner contends that the pleading, by the carrier-employer, of a release given by its employee and the em-

ployer's contention that such release could not be attacked unless the employee first tendered back the consideration of the release, is such a device as is prohibited under 45 U.S.C. Section 55.

This Court held in *Philadelphia B & W. R. Co. v.* Shubert, 224 U.S. 601 56 L.Ed. 911, 916 (construing Section 5 of the Federal Employer's Liability Act; 45 U.S.C. 55) that necessarily the liability must survive the acceptance of the benefits, or there could be no recovery and hence no set off.

The Court went further and said:

> "The words 'the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The purpose and intent of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."

Where, as in this case, an employer pleads a release as a bar to an action by its employee for injuries, but contends further that under state law, no attack can be made on the release, since there was no tender back of the consideration of the release, and thus the employee's suit should be dismissed, the employer is using state law as a device whereby its liability to its employee is defeated.

The holding of the Court of Appeals of Georgia, that, since no tender back of the consideration of the release was made, no attack could be made on the release and the employee's suit should be dismissed, is an at-

tempt by a state to declare what defenses can be interposed to rights granted under the Federal Employer's Liability Act.

Such ruling is in direct conflict with the interpretation placed on 45 U.S.C. 55 by various Federal courts in different circuits and by state courts as follows:

Irish v. Central Vermont R. Co., 164 F.2D 837 (4) 2nd Circuit:

> "A contract not to sue on claim within Federal Employers' Liability Act could by virtue of provisions in the Act be repudiated for fraud without a tender of consideration received."

Bowman v. Illinois Central Ry. Co., 132 N.W. 2nd 558 (5) (affirmed by Illinois Court of Appeals and by its Supreme Court, certiorari denied by United States Supreme Court (on another point), and holding that 45 U.S.C. Section 55 was enacted to prevent an employer who has received a release from its employee to assert return of the consideration as a condition precedent to employee's right to attack the release as a bar to the employee's action against the employer under 45 U.S.C. 51 et sequa.

Marshall v. New York Central R. Co., 218 F. 2d 900 (6) 7th Circuit, holding that where a release was obtained by fraud and misrepresentations, the employee was not required as a prerequisite to her right to maintain an action under the Act to make restitution of the amount which was received as consideration for the release.

Humphrey v. Erie R. Co., 116 F. Supp. 660 (S.D. of N.Y.) citing *Irish v. Central Vermont R. Co.*, 164 F. 2nd

837 (4) p. 667 n. 14, holding petitioner's action was not barred by reason of his failure to return the consideration of the release.

Johnson v. Elgin J. and E. Ry. Co., 87 N.E. 2d 567 (3), holds that a tender of the consideration of a release given by an employee to his employer is not a prequisite to the ployers' Liability Act, Also see:

Guy v. Cincinnati Northern R. Co. (Mich.), 166 N.W. 667 (3), certiorari denied 246 U.S. 668, 62 L.Ed. 930.

There is no question but that, both under Federal and Georgia Law, a release may be set aside for fraud or mistake of fact, thus the primary questions here are:

1. Whether the return of the consideration for a release is a prerequisite to an employee's maintenance of his action under the Federal Employers' Liability Act?
2. If such a return of the consideration is *not* required under the Act, then did not the ruling of the Court of Appeals of Georgia deprive petitioner of his right of action (a property right) in violation of the Fourteenth Amendment of the Federal Constitution?

It is petitioner's contention that there can be no doubt that petitioner has been deprived of his property right in his cause of action by the ruling of the state court, and that the state action is a violation of the Fourteenth Amendment of the United States Constitution in view of the fact that the court applied state rules of law (instead) of Federal law), which deprive him of the benefits given him under the Federal Employers' Liability Act.

That a state may not set at naught benefits granted by

Federal statute is set out in a well reasoned opinion as follows:

In *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827, 830, the court held, citing from *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176, 87 L.Ed. 165:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad (Co.) v. Tompkins, 304 U.S. 64 (58 S. Ct. 817, 82 L.Ed. 1188, 114 ALR 1487). There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law (citing cases)."

See also Restatement of the Law of Contracts, Section 480, page 831:

> "When Offer to Return Performance Received Is a Condition of the Power to Avoid."
>
> 2. A failure to return or offer to return performance received in accordance with the rule stated in subsection (1) does not preclude avoidance if the performance . . ."
>
> "(c) is merely money, the amount of which can be credited in partial cancellation of the injured party's claim . . ."
>
> "the plaintiffs are not barred from asserting fraud

by their failure to tender back the consideration of the release."

Petitioner contends that Congress, having preempted the field of relations between carriers and their employees has provided equitable protection for an employer by allowing any consideration paid to be deducted from any judgment obtained by the employee; and provided protection to the employee by prohibiting the employer from using any device which would defeat his liability to his employee for injuries received when an action is brought under the Federal Employers' Liability Act.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari to the Court of Appeals of Georgia should be granted.

Respectfully submitted,

SAMUEL D. HEWLETT, JR.
Attorney for Petitioner
1005 Healey Building
Atlanta, Georgia 30303
Telephone: 522-8441

APPENDIX A

OPINION OF THE JUDGE OF THE SUPERIOR COURT OF FULTON COUNTY OVERRULING DEFENDANT'S DEMURRERS AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

No. B 19,529

HENRY HAROLD HOGUE

v.

SOUTHERN RAILWAY COMPANY

ORDER ON DEFENDANT'S RENEWED DEMURRER TO PLAINTIFF'S PETITION AS AMENDED, SAID RENEWED DEMURRER FILED 17th JANUARY 1967

The questions of the effect of the release and all related questions are to be determined exclusively by Federal law, and not by State law. The Court is of opinion that under Federal law, particularly Sec. 5 of the Federal Employers' Liability Act, the rule generally obtaining that return of the money received must be made or offered before filing suit in which the validity of the release is attacked (83 Ga. 558), does not apply, under the circumstances here alleged in plaintiff's amended petition.

Said renewed demurrer is overruled on each ground.
This 17th January 1967.

/s/ DURWOOD T. PYE
Judge Sup. Ct.

HENRY HAROLD HOGUE

v.

SOUTHERN RAILWAY COMPANY

No. B 19,529

ORDER ON MOTION FOR SUMMARY JUDGMENT

Said motion is overruled.

This 17 January 1967.

/s/ DURWOOD T. PYE
Judge Sup. Ct.

APPENDIX B

Opinion of the Court of Appeals of Georgia

In The

COURT OF APPEALS OF GEORGIA

No. 42869

42869 SOUTHERN RAILWAY COMPANY

vs.

HENRY HAROLD HOGUE H-48

In an employee's action for injuries under the Federal Employers Liability Act, a release entered into between the employer and employee in compromise and settlement of the claim cannot be attacked for mutual mistake unless the employee tenders the return of the consideration he received for the release.

This petition contains in effect the following allegations: The plaintiff was employed as a machinist for the defendant railroad, and while so employed was injured and totally disabled to continue that employment, and he brought this action under the provisions of the Federal Employers' Liability Act, 35 Stat. 66 (1908) 45 U.S.C.A., (1952). The petition alleged that shortly after this injury the plaintiff signed a release to the defendant based upon representations by the defendant's doctor, who was treating the plaintiff, that the plaintiff had only a bruised knee and representations of the defendant's

claims agent who negotiated the release with the plaintiff that the plaintiff's injuries would not be permanent and that he had been so advised by the doctor. Relying upon and believing the advice of the defendant's doctor that the injuries were not serious, both parties made a mistake of fact as to the extent of the plaintiff's injuries and that the plaintiff would completely recover therefrom. Thereafter complications from the injuries developed requiring surgical removal of the plaintiff's knee cap and cartilage from the knee and resulting in the plaintiff's disability. The consideration paid by the defendant for the release was grossly inadequate in view of the extent of the injuries.

On this appeal the defendant enumerates as error the judgment of the trial court overruling its general demurrer on the grounds that the petition set forth no cause of action and affirmatively showed that the plaintiff was barred from recovery.

HALL, Judge. Under our federal system, for the purposes of diversity jurisdiction, a federal court is "in effect, only another court of the State . . ." and "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court." *Guaranty Trust Co. v. York*, 326 U.S. 99, S. Ct. , L.Ed. ; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, S. Ct. , L.Ed. . The corollary of this principle is the uniformity of federally created rights that seek enforcement in a State court; therefore, "local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws," e.g., the Federal Employers' Liability Act.

Brown v. Western Railway of Alabama, 338 U.S. 294, ___ S. Ct. ___, ___ L.Ed. ___. The question posed in the present case is controlled by federal law. *Dice v. Akron, C. v. Y. R. Co.*, 342 U.S. 359, ___ S. C. ___, ___ L.Ed. ___.

Section 5 of the Federal Employers' Liability Act (45 U.S.C.A. § 55), providing that any contract to enable any common carrier to "exempt itself from any liability created by this chapter shall to that extent be void," does not prevent a railroad from compromising or settling claims and obtaining releases based upon such settlements. *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L.Ed. 242. "Untainted by fraud or overreaching, full and fair compromises of FELA claims do not clash with the policy of the Act." *South Buffalo R. Co. v. Ahern*, 344 U.S. 367, 372, ___ S. Ct. ___, ___ L.Ed. ___. However, a release induced by fraud or by mutual mistake as to the nature or extent of the releasor's injuries does not bar an action to recover for the injuries. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 362, ___ S. Ct. ___, ___ L.Ed. ___; *Steele v. Erie R. Co.*, 54 F. 2d 688, 690 (W.D. NY 1930); *Chicago & N.W. Ry. Co. v. Curl*, 178 F. 2d 497 (8th Cir. 1949).

The sole question before this court—whether restitution by the claimant is a prerequisite of setting aside a release of claim under the FELA—has never been decided by the Supreme Court of the United States. There appears to be a direct conflict on this question among the other federal authorities. Some federal courts have held that an employee can maintain an action for injuries under the FELA alleging that a

release he has already given was executed as a result of fraud or mutual mistakes, without tendering restitution of the money received for the release. *Marshall v. New York Central R. Co.*, 218 F. 2d 900 (7th Cir. 1955); *Irish v. Central Vermont Ry., Inc.*, 164 F. 2d 837, 840 (2d Cir. 1947); *Humphrey v. Erie R. Co.*, 116 F. Supp. 660 (S.D. NY 1953); accord *Graham v. Atchison, T & S R. Co.*, 176 F. 2d 819 (9th Cir. 1949); see Anno. 96 A.L.R. 2d 655.

The interpretation of federal law on this question in *Collett v. L. & N. R. Co.*, 81 F. Supp. 428 (E.D. Ill. 1948), that a release entered into in compromise and settlement of a claim cannot be attacked for fraud unless the releasor tenders the return of the consideration for the release, is the same as the law that prevailed in Georgia before and after the Federal Employers' Liability Act *East Tennessee, Virginia and Georgia Ry Co., v. Hayes*, 85 Ga. 558 (10 S.E. 350); *Central of Ga. Ry. Co. v. Hoban*, 24 Ga. App. 686 (102 SE 46) There is no reason to alter the rule when the release in attacked for mutual mistake instead of fraud. The Florida Court of Appeals has decided the question as it was decided in the Collett case, supra. *Overstreet v. Atlantic Coast Line R. Co.*, Fla. App (152 So. 2d 188). We are not persuaded to interpret the federal law applicable under the Federal Employers' Liability Act differently in the absence of controlling federal authority.

The trial court erred in overruling the defendant's demurrer to the petition.

Judgment reversed. Felton, C. J., and Eberhardt, J., concur.

COURT OF APPEALS
of the State of Georgia

No. 42869

Atlanta, September 21, 1967

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

Southern Railway Co. v. H. H. Hogue

It is ordered that the remittitur in this case be stayed pending an application for the writ of certiorari to the Supreme Court of the United States.

NOTE: Please place your order for the preparation of the record as promptly as you can.

* * *

Court of Appeals of the State of Georgia

September 21, 1967

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

MORGAN THOMAS, *Clerk*

APPENDIX C

45 U.S.C. Section 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the State and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employees, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employees of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the bene-

fits of this chapter. April 22, 1908, c. 149, § 1, 35 Stat. 65; August 11, 1939, c. 685, § 1, 53 Stat. 1404.

* * *

45 U.S.C. Section 55

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. April 22, 1908, c. 149, § 5, 35 Stat. 66.

CERTIFICATE OF SERVICE

I, Samuel D. Hewlett, do certify that the foregoing petition for certiorari was served on the defendant by serving its attorney, John D. Jones, Esquire, Green, Buckley, DeRieux, Moore & Jones, 1240 National Bank of Georgia Building, Atlanta, Georgia, by furnishing them a copy through the United State Mail with proper postage thereon, on ....., 1967.

.....

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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 889

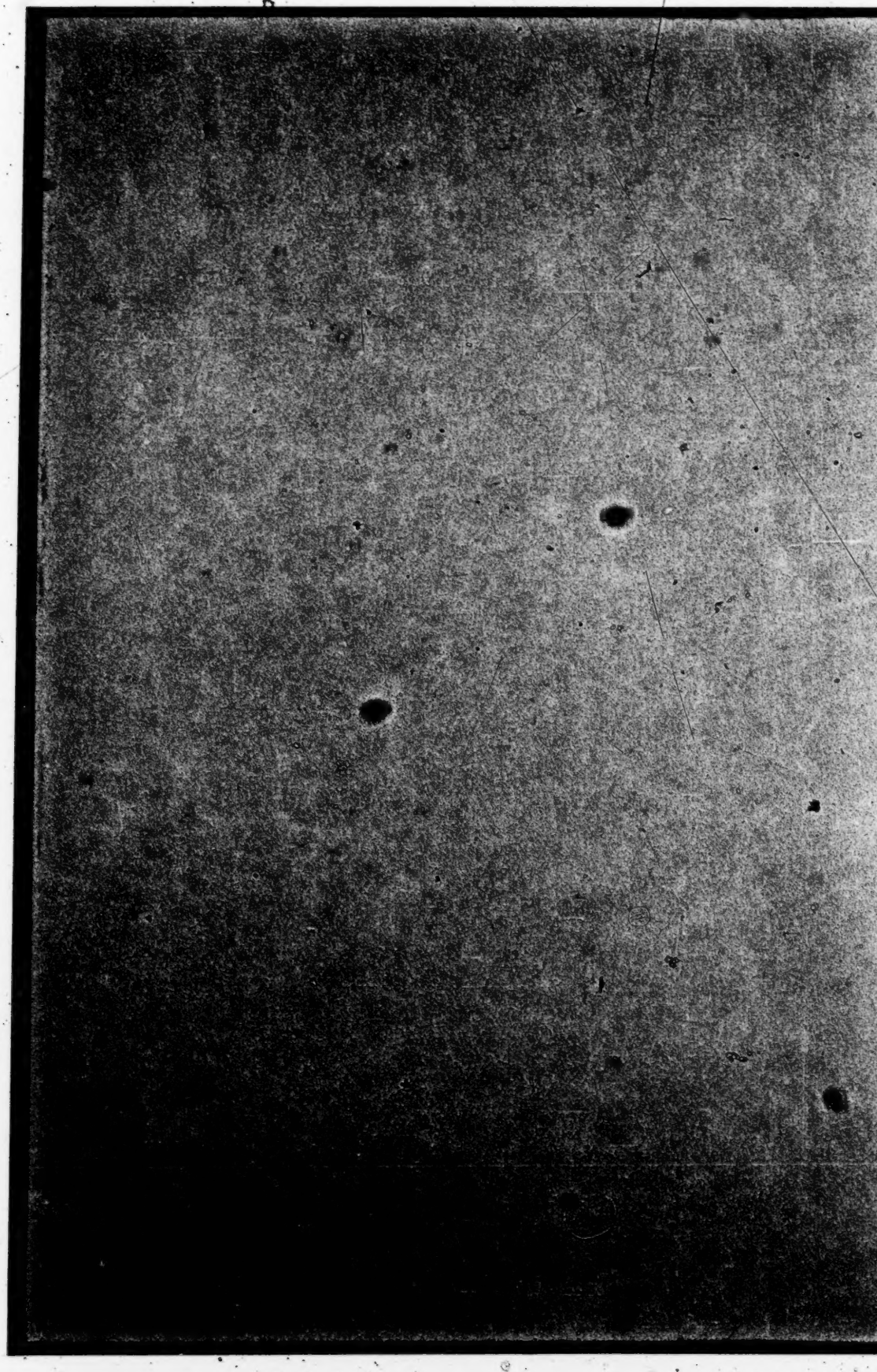
HENRY HAROLD HOGUE,
PETITIONER

vs.

SOUTHERN RAILWAY COMPANY,
RESPONDENT

On Writ of Certiorari

SUPREME COURT PRINTING HOUSE, INC.
WASHINGTON, D. C.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 889

HENRY HAROLD HOGUE,
PETITIONER

versus

SOUTHERN RAILWAY COMPANY,
RESPONDENT

On Writ of Certiorari

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PETITION

Filed: Mar. 25, 1966

GEORGIA,
FULTON COUNTY

TO THE SUPERIOR COURT OF SAID COUNTY:

The petition of HENRY HAROLD HOGUE respectfully shows:

1.

That the defendant herein is the SOUTHERN RAILWAY COMPANY, INC., a corporation of the State of Virginia, with an office and principal place of doing business within said state and county upon whom service of process may be perfected.

2.

That the defendant has injured and damaged your petitioner in the sum of ONE HUNDRED THOUSAND ($100,000) DOLLARS by reason of the facts hereinafter alleged.

3.

That at all times herein mentioned and particularly on the date herein mentioned and the time of the occurrence hereinafter related, petitioner was performing work as an employee of the defendant on behalf of the defendant in the furtherance of interstate commerce, and the instrumentalities about and with which

petitioner was working on said date and at said time were instrumentalities which were being used in the furtherance of interstate commerce.

4.

That petitioner commences this action against defendant under the provisions of Title 45 U. S. C. A., Section 51, with its amendments thereto, commonly referred to as the Federal Employers Liability Act.

5.

That at the time of the occurrence hereinafter related, your petitioner was employed by defendant as a machinist and had been so employed by defendant since August, 1941.

6.

That on the time and date of the occurrence hereinafter related, petitioner was employed by defendant and performing work in defendant's shops known as the Pegram Shops in the City of Atlanta, Georgia.

7.

That on June 22, 1963, your petitioner was assigned to the duty in said shops of dropping a traction wheel motor on a diesel engine which was located in the roundhouse of said shop for said purpose.

8.

That for the purpose of dropping said traction wheel motor there had been placed in said shop an instrument known as a drop table which was located in the middle of defendant's tracks which came into the passengers' side of the roundhouse of the defendant.

9.

That this drop table was so designed that it would raise and lower out of a hole in the ground in said shop and was actually used as a track when not in operation as a drop table.

10.

That for the purpose of locking said drop table in position, there was designed for the same a lever approximately sixteen (16) inches in length which when this table was in a locked position, would lay down into the floor of said track, and when the table was in an unlocked position, would protrude in a perpendicular fashion straight up out of said floor.

11.

That when said lever protruded straight up out of said floor, it constituted a dangerous obstruction in that there were no guards located around the same or lights on said lever to remind or warn employees of defendant working in said shop of its presence, and the same was particularly dangerous in that the light in

said shop was extremely poor and persons moving in and about said lever in performing their work for defendant were subjected to an unsafe and hazardous condition in that in attempting to perform work for defendant they would bump into said lever.

12.

That in the operation of this table it is necessary from time to time to leave the same in an unlocked position in order to maneuver said table underneath engines which were being jacked up for the purpose of removal from the same.

13.

That said lever of said table, as so designed, was an unsafe instrumentality and a hazardous one because of the fact that employees were constantly required to move in and about the same in performing the work of dropping a motor from a diesel engine.

14.

That on said date while your petitioner was attempting to use an impact gun to cut the binder bolts loose on said motor, the socket wrench which fits on said gun became disengaged, and in turning to find the same on the floor, petitioner struck his left knee on said lever causing him to sustain the following injuries, to-wit:

Petitioner severely injured and damaged his lateral

meniscus and the cartilage underlying his knee cap; petitioner further severely damaged his left knee cap and said lateral meniscus was torn and said kneecap was fractured.

15.

That as a result of said injuries, petitioner developed arthritis in said knee, and as a combination result of said arthritis and all of said injuries, it was necessary for petitioner to have his kneecap removed by surgical operation on June 10, 1964.

16.

That by reason of the injuries which petitioner has received, he is totally disabled from performing his said work as a machinist for the Southern Railway Company and will continue so to be in the future.

17.

That immediately prior to said occurrence, petitioner was a strong and able bodied man, fifty-two (52) years of age, earning and capable of earning the sum of approximately FIVE HUNDRED ($500) DOLLARS per month.

18.

That since the date of said operation, petitioner has been unable to work at all for defendant.

19.

That defendant was negligent in as follows:

(a) In providing a drop table with a projective type lever constituting a hazardous condition in walking in and about said roundhouse.

(b) In failing to properly light said roundhouse so that petitioner could ascertain the presence of said lever at all times.

(c) In failing to furnish your petitioner with a reasonably safe place to work.

WHEREFORE, petitioner prays:

(a) That he do have judgment against defendant together with costs of this action.

(Signed) SAM D. HEWLETT, JR.
SAM D. HEWLETT, JR.
Attorney for Petitioner

Suite 1313 Fulton National Bank Building
Atlanta, Georgia 30303
522-8441

NORTHCUTT & EDWARDS
Attorneys at Law

Fulton Federal Building
Atlanta, Georgia 30303

ANSWER OF SOUTHERN RAILWAY COMPANY TO PLAINTIFF'S PETITION

(Number and Title Omitted)

Filed: Apr. 22, 1966

Now comes Southern Railway Company (incorrectly referred to as Southern Railway Company, Inc.), named defendant in the above styled case, and subject to its Motion to Quash Defective Process and Service, and also subject to its demurrers heretofore filed with the court, files this its answer to plaintiff's petition, as follows:

1.

Said defendant (incorrectly referred to as Southern Railway Company, Inc.) admits that it was incorporated in the State of Virginia, that it has an office located within Fulton County, Georgia, and that it has an agent located within Fulton County, Georgia, upon whom service of process may be perfected, all as alleged in Paragraph 1 of plaintiff's petition. Any and all other allegations of Paragraph 1 of plaintiff's petition are denied.

2.

Said defendant denies the allegations of Paragraphs 2, 3 and 4 of plaintiff's petition.

3.

Said defendant admits that plaintiff was employed by said defendant as a machinist at the time of the incident in question, as alleged in Paragraph 5 of plaintiff's petition. Any and all other allegations of Paragraph 5 of plaintiff's petition are denied by said defendant.

4.

Said defendant denies the allegations of Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, including each and every sub-paragraph thereof, of plaintiff's petition.

5.

In further answer to plaintiff's petition, said defendant avers as follows:

(a) Said defendant is not indebted to plaintiff in the sum sued for or in any sum whatsoever;

(b) Said defendant was guilty of no act of negligence giving rise to the occurrence described in plaintiff's petition, with the result that plaintiff is not entitled to recover in this cause from said defendant; and

(c) Said defendant had no knowledge of the existence of any defect in the instrument in question at any time prior to the alleged incident sued upon, and there

was no defect in said instrument and equipment which could have been discovered by it in the exercise of reasonable care at any time prior to the incident alleged, with the result that plaintiff is not entitled to recover in this cause against said defendant; and

(d) The instrument in question was not defective at any time either prior to the alleged incident sued upon, or at the time of the alleged incident, with the result that plaintiff is not entitled to recover in this cause against said defendant; and

(e) There was no defect in the instrument in question at any time germane to the incident sued upon, and the sole proximate cause of alleged injuries sustained by plaintiff was the plaintiff's own negligence, with the result that plaintiff is not entitled to recover in this cause against said defendant.

WHEREFORE, said defendant prays that it be discharged hence with its reasonable costs of court.

(Signed) EDGAR A. NEELY, JR.
(Signed) C. RICHARD McQUEEN
GREENE, NEELY,
BUCKLEY & DeRIEUX
Attorneys for Defendant,
Southern Railway Company

1240 Bank of Georgia Building
Atlanta, Georgia 30303
522-3541

AMENDMENT

(Number and Title Omitted)

Filed: May 2, 1966

Now comes the plaintiff in the above-styled cause and amends his petition as follows:

By adding to said petition a new sub-paragraph beneath the plaintiff's prayer numbered sub-paragraph (b), to read as follows:

"(b) That process do issue directed to defendant requiring it to answer this complaint in terms of law."

WHEREFORE, petitioner prays:

(a) That this amendment be allowed and ordered filed subject to objections by defendant;

(b) That new process be issued by the Clerk of the Fulton Superior Court directed to defendant requiring it to answer plaintiff's petition in terms of law; and

(c) That this amendment and the original petition be attached to a new process and served upon the defendant by the Sheriff of Fulton County, Georgia, requiring it to answer this complaint in terms of law.

(Signed) SAM D. HEWLETT, JR.
SAM D. HEWLETT, JR.
Attorney for Plaintiff

1313 Fulton National Bank Building
Atlanta, Georgia 30303
522-8441

PLEA IN BAR OF DEFENDANT SOUTHERN RAILWAY COMPANY

(Number and Title Omitted)

Filed: June 1, 1966

Now comes Southern Railway Company (erroneously referred to as Southern Railway Company, Inc.), named defendant in the above styled case, and before filing answer to plaintiff's petition served on said defendant on May 4, 1966, files this its Plea in Bar to plaintiff's cause of action, and in support thereof shows to the court the following facts:

1.

Said defendant shows that on or about June 25, 1963, plaintiff was employed by defendant working as a machinist in defendant's mechanical department located at its Pegram Shop in Atlanta, Georgia.

2.

Plaintiff claimed to defendant that, on said date while so working during the process of his dropping a pair of traction motor wheels on a drop pit table located within Pegram Shop that he bent down to pick up a piece of equipment and thereupon plaintiff's left knee struck the operating lever to said drop pit table, resulting in alleged injuries to him.

3.

As a result of the claimed occurrence as set forth in Paragraph 2 hereinabove, defendant paid to plaintiff the sum of $105.00 as consideration for plaintiff executing a release in full and final settlement of any and all claims, demands, actions, or causes of action of any kind whatsoever which plaintiff had or could thereafter have, on account of, arising out of or in connection with said personal injuries sustained by plaintiff at or near Atlanta, Georgia, on or about June 25, 1963. A copy of Sight Draft No. 757, in the amount of $105.00, made payable to the order of H. H. Hogue and drawn by J. B. Woods, Claim Agent, Southern Railway Company, is attached hereto as Exhibit "A" and made a part hereof. A copy of the aforesaid release executed on July 30, 1963 by plaintiff for and in consideration of the aforesaid payment of $105.00, is attached hereto as Exhibit "B" and made a part hereof.

4.

Said defendant shows that it at no time had notice of any alleged injury of June 22, 1963 until after the present lawsuit was filed. Defendant has made diligent inquiry and can find no evidence whatsoever respecting any alleged incident of June 22, 1963, resulting in alleged injuries to plaintiff. On the other hand, the allegations of plaintiff's petition as to how said incident occurred, as well as the alleged injuries allegedly sustained thereby, are substantially the same as the circumstances related by plaintiff to defendant with respect to the incident which occurred to and al-

leged personal injuries sustained by plaintiff on or about June 25, 1963, for which defendant paid to plaintiff the sum of $105.00 (as shown by Exhibit "A") in consideration for plaintiff executing a release (as shown by Exhibit "B"). Accordingly, defendant avers that the incident sued upon and the incident for which defendant paid plaintiff the sum of $105.00 in consideration for plaintiff executing a release, are in fact the same incident.

5.

By reason of the facts set forth hereinabove, said defendant shows that the aforesaid release executed by plaintiff for and in consideration of the payment by defendant to plaintiff of the sum of $105.00, constitutes a complete bar to the present cause of action.

WHEREFORE, for the reasons stated hereinabove, said defendant prays that plaintiff's petition be dismissed.

(Signed) EDGAR A. NEELY, JR.
(Signed) RICHARD McQUEEN
GREENE, NEELY,
BUCKLEY & DeRIEUX
Attorneys for Defendant
Southern Railway Company

1240 Bank of Georgia Building
Atlanta, Georgia 30303
522-3541

EXHIBIT B

SOUTHERN RAILWAY COMPANY
RELEASE

Credit Account Of
J. B. Woods, Claim Agent
Sight Draft No. 757
Date 7-30-63

I, H. H. Hogue S S Account No. 718-14-7997 of Atlanta, Ga. in consideration of the payment to me by SOUTHERN RAILWAY COMPANY of the sum of _____ One hundred five & 00/100 _____ Dollars ($105.00), the receipt of which is hereby acknowledged, hereby release and forever discharge said SOUTHERN RAILWAY COMPANY from any and all claims, demands, actions, or causes of action, of any kind whatsoever, which I have, or could hereafter have, on account of, arising out of or in connection with personal injuries sustained at or near Atlanta, Ga. on or about the 25 day of June 1963

I hereby authorize SOUTHERN RAILWAY COMPANY to withhold and pay to the appropriate District Director of Internal Revenue on my behalf the amount stipulated in Item 3 below, based on the factors stipulated in Items 1 and 2 below, to withhold and pay to the Railroad Retirement Board the amount stipulated in Item 4 below, and to make net payment to me of the amount stipulated in Item 5 below. It is understood that the apportionments and deductions made herein are for the purpose of complying with the Rail-

road Retirement Act, the Railroad Retirement Tax Act and the Railroad Unemployment Insurance Act, all as amended, and for no other purpose.

1.	Amount apportioned to factors other than damages for time lost	$105.00
2.	Amount apportioned to damages for time lost from the ..... day of ....., 19 ..., to the ..... day of ....., 19 ...	$ .00
	Total	$105.00
3.	Amount deducted for Railroad Retirement Tax based on ..... % of amount shown in Item 2 above	$ .00
4.	Deduction payable to Railroad Retirement Board for amount paid me during period stated in Item 2 above for sick benefits or Unemployment Compensation under the provisions of the Railroad Unemployment Insurance Act	$ .00
5.	Net amount payable to me	$105.00

This release, the apportionments made herein, and the deductions authorized hereby are fully understood by me and constitute the entire agreement between the parties hereto. This release is executed solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever.

Given under my hand and seal, this ..... day of ....., 19.....

THIS IS NOT A RECEIPT FOR WAGES — IT IS A GENERAL RELEASE.

(Signed) H. H. HOGUE
(SEAL)

Witness
(Signed) C. W. GARDINER
2731 Larkspur Dr., S.E.
Witness
(Signed) ILLEGIBLE
(Address) ILLEGIBLE
Approved for Audit:
(Signed) ILLEGIBLE
Comptroller

ANSWER OF SOUTHERN RAILWAY COMPANY TO PLAINTIFF'S PETITION SERVED ON MAY 4, 1966

(Number and Title Omitted)

Filed: June 1, 1966

Now comes Southern Railway Company (erroneously referred to as Southern Railway Company, Inc.), named defendant in the above styled case, and subject to its Plea in Bar heretofore filed with the court, and

subject to its demurrers heretofore filed with the Court, files this its answer to plaintiff's petition served on May 4, 1966, as follows:

1.

Said defendant (erroneously referred to as Southern Railway Company, Inc.) admits that it was incorporated in the State of Virginia, that it has an office located within Fulton County, Georgia, and that it has an agent located within Fulton County, Georgia, upon whom service of process may be perfected, all as alleged in Paragraph 1 of plaintiff's petition. Any and all other allegations of Paragraph 1 of plaintiff's petition are denied.

2.

Said defendant denies the allegations of Paragraphs 2, 3 and 4 of plaintiff's petition.

3.

Said defendant denies the allegations of Paragraph 5 of plaintiff's petition.

4.

Said defendant denies the allegations of Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, including each and every sub-paragraph thereof, of plaintiff's petition.

5.

In further answer to plaintiff's petition, said defendant avers as follows:

(a) By reason of the facts heretofore set forth in the Plea in Bar of defendant Southern Railway Company, defendant avers that the release (attached to said Plea as Exhibit "B") executed by plaintiff for and in consideration of the payment by defendant to plaintiff of the sum of $105.00 constitutes a complete bar to the present cause of action, with the result that said defendant is not indebted to plaintiff in the sum sued for or in any sum whatsoever, and plaintiff is not entitled to recover in this cause from said defendant.

(b) If the aforesaid release executed by plaintiff does not constitute a complete bar to the present cause of action — and said defendant avers that the aforesaid release does constitute a complete bar to the present cause of action — said defendant was guilty of no act of negligence giving rise to the occurrence described in plaintiff's petition, with the result that plaintiff is not entitled to recover in this cause from said defendant; and

(c) If the aforesaid release executed by plaintiff does not constitute a complete bar to the present cause of action — and said defendant avers that the aforesaid release does constitute a complete bar to the present cause of action — said defendant had no knowledge of the existence of any defect in the instrument in question at any time prior to the alleged incident

sued upon, and there was no defect in said instrument and equipment which could have been discovered by it in the exercise of reasonable care at any time prior to the incident alleged, with the result that plaintiff is not entitled to recover in this cause against said defendant; and

(d) If the aforesaid release executed by plaintiff does not constitute a complete bar to the present cause of action — and said defendant avers that the aforesaid release does constitute a complete bar to the present cause of action — the instrument in question was not defective at any time either prior to the alleged incident sued upon, or at the time of the alleged incident, with the result that plaintiff is not entitled to recover in this cause against said defendant; and

(e) If the aforesaid release executed by plaintiff does not constitute a complete bar to the present cause of action — and said defendant avers that the aforesaid release does constitute a complete bar to the present cause of action — there was no defect in the instrument in question at any time germane to the incident sued upon, and the sole proximate cause of alleged injuries sustained by plaintiff was the plaintiff's own negligence, with the result that plaintiff is not entitled to recover in this cause against said defendant.

WHEREFORE, said defendant prays that it be discharged hence with its reasonable costs of court.

(Signed) EDGAR A. NEELY, JR.
(Signed) RICHARD McQUEEN
GREENE, NEELY,
BUCKLEY & DeRIEUX
Attorneys for Defendant,
Southern Railway Company

1240 Bank of Georgia Building
Atlanta, Georgia 30303

AMENDMENT

(Number and Title Omitted)

Filed: Dec. 6, 1966

Now comes the plaintiff in the above stated case, with leave of Court first obtained, and amends his petition as follows:

1.

Paragraph 7 is amended by striking the figure 22 on the first line of said paragraph and substituting therefor the figure 25, so that said paragraph as amended shall read:

"7.

"That on June 25, 1963, your petitioner was assigned to the duty in said shops of dropping a traction wheel motor on a diesel engine which was located in the roundhouse of said shop for said purpose."

2.

By adding new paragraphs to be known as paragraphs 15(a), 15(b), 15(c), 15(d), 15(e), and 15(f), as follows:

"15(a).

"That plaintiff, on July 30, 1963, signed a release for defendant because of a mutual mistake of both defendant and petitioner as to the extent of the injuries received by petitioner in the occurrence set forth in plaintiff's petition.

"15(b).

"That both petitioner and defendant herein believed that petitioner's injuries were not serious and that he would completely recover from the injuries.

"15(c).

"That petitioner was being treated for his injuries by the defendant's physician, Dr. L. H.

McDonald, who advised petitioner after approximately four days that he would be all right and could go back to work, and that his injuries were not serious.

"15(d).

"That petitioner believed that his injuries were slight and that he had recovered. That both petitioner and defendant, relying on the doctor's diagnosis, entered into the release.

"15(e).

"That the amount of the consideration paid to petitioner under such release was grossly inadequate in view of the extent of petitioner's injuries.

"15(f).

"That such release given under the above stated facts is not a bar under the Federal Employers Liability Act."

WHEREFORE, petitioner prays that this his amendment be allowed and ordered filed, subject to objection and demurrer.

SAM D. HEWLETT, JR.
Attorney for Petitioner
(Signed) FLORENCE HEWLETT DENDY
FLORENCE HEWLETT DENDY,
Associate

Suite 1313 Fulton National
Bank Building
Atlanta, Georgia 30303
Telephone: 522-8441

EXCERPTS FROM DEPOSITION OF PETITIONER

[2] HENRY HAROLD HOGUE,
being first duly sworn, deposed and testified as follows:

CROSS-EXAMINATION

BY MR. DeRIEUX:

Q Are you Mr. Henry Harold Hogue?

A Yes, sir.

* * * *

Q Are you employed?

[3] A Partially.

Q Where are you employed?

A Cummins, Georgia Diesel, Incorporated at 100 University Avenue, SW.

Q How do you spell Cummins?

A C-u-m-m-i-n-s.

Q And how long have you been employed at that company?

A Well, about fourteen months.

Q What kind of job do you have there?

A Well, I only pick up twenty pounds. It's repairing fuel pumps.

Q You do anything other than repair fuel pumps?

A Nothing else.

Q Have you done any other type of work with Cummins other than repair fuel pumps —

A No, sir.

Q — during this fourteen months?

A That's right.

Q What kind of pay scale are you on?

A I started at $2.40 an hour.

Q You mean you started fourteen months ago at $2.40 an hour?

A Yes, sir.

Q What scale are you on now?

A $2.80.

[4] Q When did you get this raise?

A Oh, it's been four or five months.

Q How many hours a week do you normally work?

A Well, we are on a 40-hour schedule, but I can hardly make it.

Q Is it your testimony that you don't make 40 hours a week?

A Not every week, no, sir.

* * * *

PLAINTIFF'S AMENDMENT

(Number and Title Omitted)

Filed: Jan. 17, 1967

Now comes the plaintiff in the above styled case, with leave of Court first obtained, and amends his petition as follows:

1.

By adding to said petition a new paragraph to be denominated paragraph 15(g), and to read as follows:

"15(g).

"That the aforementioned release above referred to was based upon representations by the defendant's doctor, Dr. Louis McDonald, to the effect that petitioner had only a bruised knee and it was further negotiated with petitioner by the defendant's claim agent, one J. B. Woods, who also represented to petitioner that he had been advised by Dr. McDonald and had a report from the said Dr. McDonald to the same effect, and further by the representation by said claim agent that petitioner would have no further difficulty with his knee, and that his injuries would not be permanent in nature."

2.

By adding to said petition a new paragraph to be denominated paragraph 15(h), and to read as follows:

"15(h).

"That the aforementioned release executed by the parties was a release which only contemplated the lost time which petitioner had suffered during the time that his knee was bruised, in the amount of $105.00, and did not contemplate the injuries which petitioner later ascertained resulted by reason of the removal of his knee cap and the cartilage in his knee, as herein alleged above in petitioner's complaint."

3.

By adding to said petition a new paragraph to be denominated paragraph 15(i), and to read as follows:

"15(i).

"That the aforementioned release did not constitute a release of these injuries because they were injuries which petitioner did not know of, nor was he so informed by defendant's doctor, to whom he submitted himself for examination and treatment at the request of the defendant, through its Claim Agent, one J. B. Woods, and through its Master Mechanic. That

said release only contemplated that petitioner was being paid for his lost time suffered up until the date of the execution of said release, since this was the only time which it was contemplated by the parties that petitioner would lose, based upon the findings of defendant's doctor and the representations by defendant's Claim Agent."

WHEREFORE, petitioner prays that this his amendment to his petition be allowed and ordered filed.

(Signed) SAM D. HEWLETT, JR.
SAM D. HEWLETT, JR.
Attorney for Plaintiff

Suite 1313 Fulton National
Bank Building
Atlanta, Georgia 30303
Telephone: 522-8441

DEFENDANT'S OBJECTIONS TO THE ALLOWANCE OF PLAINTIFF'S AMENDMENT TENDERED JANUARY 17, 1966

(Number and Title Omitted)

Filed: January 17, 1967

Defendant specially demurrs to, Objections to the Allowance of plaintiff's Amendment, in respect of the allegation of paragraph 15 (h) of said petition, as amended upon the following grounds:

(a) Said allegation constitutes pleading of evidence, contrary to the rules of good pleadings which obtain in this state; and,

(b) Plaintiff therein purports to construe a document which for all that appears in the pleadings, is a written document and, thus, pleads that which is not the highest and best evidence, and thus that which is inadmissable; and,

(c) Plaintiff therein purports to construe and interpret the terms of an unambiguous contract, contrary to the rules of good pleading which obtain within this state; and,

(d) Said allegation constitutes a mere conclusion of the pleader with respect to the provisions of the release therein referred to which conclusions, in the absence of the exact language of the release itself being pleaded, are unsupported by the well pleaded allegations of said petition, as amended.

2.

Defendant objects to the allowance of the allegation of paragraph 15 (i) of said petition, as amended, upon each and every one of the several grounds of objection heretofore set forth with reference to paragraph 15(h) of said petition, as amended, in the next preceding paragraph of these objections.

WHEREFORE, defendant prays that the foregoing objections be sustained upon each and every ground thereof.

John D. Jones
Attorney for Defendant

Service acknowledged, copy
received this 17 day of
January, 1967.
F. Dendy

The foregoing objections are sustained to the extent that the Amendment undertakes to limit and restrict the terms of the release, and allegations of the amendment limiting and restricting the terms of the release are not allowed, plaintiff not setting out a copy of the release, and it appearing from par. 15 a that it is in writing.

This 17 January, 1967.

Durwood T. Pye
Judge, Sup. Ct.

DEFENDANTS' RENEWED DEMURRERS TO PLAINTIFF'S PETITION, AS AMENDED

(Number and Title Omitted)

Filed: Jan. 17, 1967

Comes now Southern Railway Company, defendant in the above styled cause, & files these its renewed demurrers to plaintiff's petition as amended through Jan. 17, 1967, as follows:

1.

Defendant renews its general demurrer contained within paragraph No. 1 of Defendant's demurrers filed with the Court on Dec. 30, 1966.

2.

Defendant renews its general demurrer contained within paragraph No. 2 of Defendant's demurrers filed with the Court on Dec. 30, 1966.

Wherefore, defendant prays that these its demurrers be sustained upon each & every ground thereof & that said Petition be dismissed.

This 17th Jan. 1967

John D. Jones
Atty for Dft

ORDER ON DEFENDANT'S RENEWED DEMURRER TO PLAINTIFF'S PETITION AS AMENDED

(Number and Title Omitted)

Filed: Jan. 17, 1967

The questions of the affect of the release and all related questions are to be determined exclusively by Federal law, and not by State law. The Court is of opinion that under Federal law, particularly Sec. 5 of the Federal Employer's Liability Act, the rule generally obtaining that return of the money received must be made or offered before filing suit in which the validity of the release is attacked (83 Ga 558), does not apply, under the circumstances here alleged in plaintiff's amended petition.

Said renewed demurrer is overruled on each ground.

This 17th January 1967.

Durwood T Pye
Judge Sup Ct

OPINION OF COURT OF APPEALS OF GEORGIA

42869 SOUTHERN RAILWAY CO. v. H. H. HOGUE H-48

In an employee's action for injuries under the Federal Employers' Liability Act, a release entered into between the employer and employee in compromise and settlement of the claim cannot be attacked for mutual mistake unless the employee tenders the return of the consideration he received for the release.

This petition contains in effect the following allegations: The plaintiff was employed as a machinist for the defendant railroad, and while so employed was injured and totally disabled to continue that employment, and he brought this action under the provisions of the Federal Employers' Liability Act, 35 Stat. 66 (1908) 45 U.S.C.A., (1952). The petition alleged that shortly after this injury the plaintiff signed a release to the defendant based upon representations by the defendant's doctor, who was treating the plaintiff, that the plaintiff had only a bruised knee and representations of the defendant's claims agent who negotiated the release with the plaintiff that the plaintiff's injuries would not be permanent and that he had been so advised by the doctor. Relying upon and believing the advice of the defendant's doctor that the injuries were not serious, both parties made a mistake of fact as to the extent of the plaintiff's injuries and that the plaintiff would completely recover therefrom. Thereafter complications from the injuries developed requiring surgical removal of the plaintiff's knee cap

and cartilage from the knee and resulting in the plaintiff's disability. The consideration paid by the defendant for the release was grossly inadequate in view of the extent of the injuries.

On this appeal the defendant enumerates as error the judgment of the trial court overruling its general demurrer on the grounds that the petition set forth no cause of action and affirmatively showed that the plaintiff was barred from recovery.

HALL, Judge. Under our federal system, for the purposes of diversity jurisdiction, a federal court is "in effect, only another court of the State. . ." and "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court." Guaranty Trust Co. v. York, 326 U. S. 99, S. Ct. , L. Ed. ; Erie Railroad Co. v. Tompkins, 304 U. S. 64, S. Ct. , L. Ed. . The corollary of this principle is the uniformity of federally created rights that seek enforcement in a State court; therefore, "local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws," e.g., the Federal Employers' Liability Act. Brown v. Western Railway of Alabama, 338 U. S. 294, S.Ct. , L. Ed. . The question posed in the present case is controlled by federal law. Dice v. Akron, C. & Y. R. Co., 342 U. S. 359, S. Ct. , L. Ed.

Section 5 of the Federal Employers' Liability Act (45 U.S.C.A. §55), providing that any contract to enable any common carrier to "exempt itself from any liability created by this chapter shall to that extent be void," does not prevent a railroad from compromising or settling claims and obtaining releases based upon such settlements. Callen v. Pennsylvania Railroad Co., 332 U. S. 625, S. Ct. , L. Ed. . "Untainted by fraud or overreaching, full and fair compromises of FELA claims do not clash with the policy of the Act." South Buffalo R. Co. v. Ahern, 344 U. S. 367, 372, S. Ct. , L. Ed. . However, a release induced by fraud or by mutual mistake as to the nature or extent of the releasor's injuries does not bar an action to recover for the injuries. Dice v. Akron, C. & Y. R. Co., 342 U. S. 359, 362, S. Ct. , L. Ed. ; Steele v. Erie R. Co., 54 F. 2d 688, 690 (W.D. NY 1930); Chicago & N.W. Ry. Co. v. Curl, 178 F. 2d 497 (8th Cir. 1949).

The sole question before this court — whether restitution by the claimant is a prerequisite of setting aside a release of claim under the FELA — has never been decided by the Supreme Court of the United States. There appears to be a direct conflict on this question among the other federal authorities. Some federal courts have held that an employee can maintain an action for injuries under the FELA alleging that a release he has already given was executed as a result of fraud or mutual mistake, without tendering restitution of-

the money received for the release. Marshall v. New York Central R. Co., 218 F. 2d 900 (7th Cir. 1955); Irish v. Central Vermont Ry., Inc., 164 F. 2d 837, 840 (2d Cir. 1947); Humphrey v. Erie R. Co., 116 F. Supp. 660 (S.D. NY 1953); accord Graham v. Atchicon, T & S R. Co., 176 F. 2d 819 (9th Cir., 1949); see Anno. 96 A.L.R. 2d 655.

The interpretation of federal law on this question in Collett v. L. & N. R. Co., 81 F. Supp. 248 (E.D. Ill. 1948), that a release entered into in compromise and settlement of a claim cannot be attacked for fraud unless the releasor tenders the return of the consideration for the release, is the same as the law that prevailed in Georgia before and after the Federal Employers' Liability Act. East Tennessee, Virginia and Georgia Ry. Co., v. Hayes, 83 Ga. 558 (10 SE 350); Central of Ga. Ry. Co. v. Hoban, 24 Ga. App. 686 (101 SE 919). There is no reason to alter the rule when the release is attacked for mutual mistake instead of fraud. The Florida Court of Appeals has decided the question as it was decided in the Collett case, supra. Overstreet v. Atlantic Coast Line R. Co., Fla. App. (152 So. 2d 188). We are not persuaded to interpret the federal law applicable under the Federal Employer's Liability Act differently in the absence of controlling federal authority.

The trial court erred in overruling the defendant's demurrer to the petition.

Judgment reversed. Felton, C. J., and Eberhardt, J., concur.

JUDGMENT

Court of Appeals
of the State of Georgia
Atlanta, June 28, 1967

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

Southern Railway Co. v. H. H. Hogue

This case came before this court on appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reason the trial court erred in overruling the defendant's demurrer to the petition. Felton, C. J., Hall and Eberhardt, JJ., concur.

MOTION FOR REHEARING

(Number and Title Omitted)

Filed: July 10, 1967

COMES NOW the Appellee in the above styled case and within the time provided by law and the Rules of this Court makes this his Motion for Rehearing on the following grounds:

GROUND ONE

That this Court has failed to consider the principle of law that under the Federal Employers Liability Act, Federal law is controlling and that Congress has pre-empted the field under the Federal Employers Liability Act as to what defenses may be urged, this being a matter of Federal law and not State law. See 12 Federal Rules Decision 13, 55 Federal Employers Liability Act where it is stated as follows:

> "Where there is an allegation of fraud or invalidity in the release, the employer is sometimes expected to tender a return of the consideration, as a condition precedent to maintaining his action. This is manifestly unfair. It places upon the employee's right to recovery a legal condition which he cannot in fact meet. In effect, the employer has neatly immunized himself from liability. The Supreme Court, however, has expressly declared that an agreement between carrier and employee requiring a return of moneys advanced for living expenses in consideration of settling a claim without resorting to litigation violated Section 5 of the Act." 272

> "Since a contractual requirement of tender is violative of the Act, a judicial rule should likewise be prohibited with respect to cases under the F.E.L.A." 272 *Duncan v. Thompson*, 315 U.S. 1, 62 S. Ct. 422, 86 L. Ed. 575.

GROUND TWO

Plaintiff further shows that the Court has overlooked not only the above facts set forth in Ground One of this Motion for Rehearing, but also the further fact that the decision cited by the Court of Appeals in *East Tennessee, Virginia and Georgia Ry. Co. v. Haynes*, 83 Ga. 558 (10 S.E. 350) was a Georgia decision decided *prior* to the enactment of 45 U.S.C.A., Section 55 of the Federal Employers Liability Act, containing the provisions cited in Federal Rules Decisions, supra, as to releases, contracts, devices on the part of an employer designed to defeat an employee's recovery under the provisions of said Act. Therefore, this decision is not controlling and could not be controlling, since it would be an effort on the part of a Georgia Court to pre-empt a field over which Congress only has the right to legislate under the provisions of the Federal Employers Liability Act.

Further, this Court has overlooked the fact that *Collette v. L. & N. Ry. Co.*, 81. Fed. Supp. 428 (Ill.) was a case decided not by an Appellate Court but by a single District Judge and was not appealed or reviewed by an Appellate Court. Likewise, subsequent to this decision, an Appellate Court of Illinois in an unanimous decision in *Johnson v. Elgin J. E. Ry. Co.*, 87 N.E. 2nd 567 held as follows:

> (3) "The statute providing that carrier may set off any indemnity that may have been paid to injured employees does not require a tender back of consideration paid as a condi-

tion precedent to the maintenance of an action against a railroad by an employee for injuries, and the acceptance and retention by employee of check given by railroad and failure of employee to return or offer to return the money received did not bar the action. Federal Employers Liability Act, 45 U.S.C.A., 55 (decided after *Collette* case)

GROUND THREE

In further support of plaintiff's contention that the Federal law controls and not the State law we call the Court's attention to *Dice v. Akron, C. & Y. Ry. Co.*, 342 U.S. 349, 96 L. Ed. 389, 72 S. Ct. 312(1)(2) which holds:

"We agree with the Court of Appeals of Summit County, Ohio and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers Liability Act raises a Federal question rather than state law. Congress in Section 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this Federal right shall be. *Chesapeake & Ohio R. Co. v. Kuhn*, 234 U. S. 44, 75 L. Ed. 157, 52 S. Ct. 45; *Ricketts vs. Pennsylvania R. Co.*, (CA 2d NY) 153 F. 2nd 757, 759, 164 ALR 387. Manifestly, the Federal rights affording relief to injured railroad employees under federally declared

standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act.

See Also: Bowman v. Illinois Central R. Co., 142 N.E. 2nd 104, certiorari denied, 355 U.S. 387, 2 L. Ed. 2nd 49.

CONCLUSION

In conclusion plaintiff's says that plaintiff's Motion for Rehearing should be granted and this Court should consider thoroughly the constructions placed on the Federal Employers Liability Act, 12 Federal Rules Decisions 13, 55 cited herein and that the judgment of the lower court should be affirmed since to hold otherwise would require an employee to be barred by a device obtained by the employer paying to the employee money which the employee cannot now raise to return and permit a release obtained for the payment of money to be a bar when the Federal decisions have held that a release is not a bar as to the employee, since the employer is protected by the method provided by Congress by deduction from any judgment of the sum paid by the employer as a credit, if the jury finds that the employee is entitled to recover damages against the employer.

Respectfully submitted,

(Signed) FLORENCE HEWLETT DENDY
FLORENCE HEWLETT DENDY
(Signed) SAM D. HEWLETT, JR.
SAM D. HEWLETT, JR.
Attorneys for Appellee

DENIAL OF MOTION FOR REHEARING

Court of Appeals
of the State of Georgia
Atlanta, July 14, 1967

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

Southern Railway Co. v. H. H. Hogue

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

DENIAL OF CERTIORARI BY SUPREME COURT OF GEORGIA

Filed: Sept. 21, 1967

Supreme Court of Georgia
Atlanta, September 7, 1967

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Henry Harold Hogue v. Southern Railway Company.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $15.00

Supreme Court of the State of Georgia
Clerk's Office, Atlanta September 20, 1967

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Samuel D. Hewlett, Jr. paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(Signed) HENRY H. COBB
Clerk.

Case No. 42869
Court of Appeals of Georgia
Remittitur from Supreme Court

REQUEST OF APPELLEE FOR A STAY OF THE REMITTITUR PENDING HIS APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

(Number and Title Omitted)

Filed: Sept. 21, 1967

Now comes appellee in the above stated case and hereby notifies appellant, Southern Railway Company, that the appellee shall, within the time provided by law; apply to the Supreme Court of the United States for a writ of certiorari to review the decision of the Court of Appeals of Georgia reversing the decision of the Honorable Durwood Pye and denying appellee's motion for a rehearing.

Appellee requests that the Court of Appeals grant him a stay of the remittitur in this case pending his application for certiorari to the Supreme Court of the United States. The Clerk is directed and requested to prepare and transmit to the Supreme Court of the United States the entire record in the above stated case with the exception of briefs of the parties.

(Signed) FLORENCE HEWLETT DENDY
FLORENCE HEWLETT DENDY
(Signed) SAMUEL D. HEWLETT
SAMUEL D. HEWLETT
Attorneys for Appellee
1005 Healey Building
Atlanta, Georgia 30303
Telephone 522-8441

ORDER GRANTING STAY OF REMITTITUR

Court of Appeals
of the State of Georgia
Atlanta, September 21, 1967

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

Southern Railway Co. v. H. H. Hogue

It is ordered that the remittitur in this case be stayed pending an application for the writ of certiorari to the Supreme Court of the United States.

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No. 558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

[illegible] *Petitioner*,

vs.

SOUTHERN RAILWAY COMPANY, *Respondent*.

[illegible]

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES A. HOUSKY
701 Union Trust Building
Washington, D. C.

JOHN D. JONES
C. RICHARD MCQUEEN
1210 Bank of Georgia Building
Atlanta, Georgia

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 889

HENRY HAROLD HOGUE, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported at 116 Ga. App. 194, 156 S.E. 2d 412 and is printed at pages 13-16 of Appendix B of the petition. The memorandum order of the Superior Court of Fulton County, Georgia, which is printed at page 11 of Appendix A of the petition, is not reported.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on June 28, 1967 (R. 142). A petition for a writ of certiorari to the Georgia Supreme Court was

denied on September 7, 1967 (R. 153). The petition for certiorari was filed on December 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Where the defendant in an action under the Federal Employers' Liability Act relies on a release by the employee, can the employee challenge the validity of the release on the ground of mutual mistake of fact without first tendering the amount paid him pursuant to the release?

STATUTES INVOLVED

Sections 1 and 5 of the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65, as amended, 45 U.S.C. Secs. 51, 55) are set forth in Appendix C of the petition, pages 18-19.

STATEMENT

Petitioner's action was brought in the Superior Court of Fulton County, Georgia, under the Federal Employers' Liability Act (Act of April 22, 1908, 35 Stat. 65, as amended, 45 U.S.C. Secs. 51 *et seq.*) to recover for an injury allegedly sustained in the course of his employment by respondent (R. 5). Respondent, by a plea in bar, demurrer and answer, set forth a release signed by petitioner for consideration and given to respondent (R. 27, 34, 39, 108, 118). Petitioner, in turn, amended his complaint to answer respondent's pleadings, and alleged that the release was obtained by reason of mutual mistake of fact as to petitioner's injury, both parties relying on the assurance of respondent's doctor that the injury was only a bruised knee, whereas it was later determined that the injury was

permanent and more serious (R. 47, 52, 90, 110). Respondent then filed demurrers to the amended complaint, and asserted that petitioner was not entitled to attack the release on the ground of mutual mistake without a tender of the consideration which he had received when the release was signed, while pointing out that no such tender had been made.

The Superior Court overruled respondent's demurrer and denied its motion for a summary judgment (R. 119, 120; Pet. App. A, pp. 11, 12). On appeal, the Georgia Court of Appeals reversed the judgment, concluding that Federal law respecting the necessity of a tender did not differ from the law of Georgia. Thus, the court held that under the facts alleged the release could not be attacked without tender of the consideration (R. 135, 142; Pet. App. B, pp. 13-16). Petitioner's application for a writ of certiorari to the Supreme Court of Georgia was denied, without opinion (R. 153).

REASONS FOR DENYING THE WRIT

This proceeding involves the obligation of a plaintiff suing under the Federal Employers' Liability Act to tender a return of the consideration which he received for a release when he seeks to avoid that release on the ground of a mutual mistake of fact. It is significant, in view of the authorities discussed below, that petitioner asserts that the case involves a different issue—whether such a tender must be made when the release is attacked on the grounds of fraud. In his first "Question Presented" (pp. 2-3), petitioner would have it appear that his attack on the release in this case was "on the ground of mutual mistake of fact and fraud." In fact, no charge of fraud is made in his amended complaint.

On the question which this proceeding *does* present, both Federal and State courts applying the Federal Employers' Liability Act have recognized that where a plaintiff seeks to avoid a release on grounds such as that which petitioner claims in his amended complaint in this proceeding, he must make a tender of the consideration he received when the release was executed. The Ninth Circuit Court of Appeals has stated, in a case arising under the Act, that "Except where fraud enters into the execution of a release, rescission must be timely and a tender of the consideration received for the release must be made." *Graham* v. *Atchison, T. & S.F. Ry.*, 176 F.2d 819, 826 (1949). To the same effect are the cases brought under the Act in the State courts. *Central of Ga. Ry.* v. *Ramsey*, 275 Ala. 7, 151 So. 2d 725 (1962); *Allison* v. *Chicago G. West. Ry.*, 240 Minn. 547, 62 N.W. 2d 374 (1954); *Squire* v. *Wheeling & Lake Erie Ry.*, 91 Ohio App. 507, 108 N.E. 2d 846 (1950), *rev'd on other grounds*, 155 Ohio St. 201, 98 N.E. 2d 313 (1951), *rev'd*, 342 U.S. 935; *Union Pac. R.R.* v. *Zimmer*, 87 Cal. App. 2d 524, 197 P.2d 363 (1948). *Cf Seymour* v. *Chicago & N.W. Ry.*, 181 Iowa 218, 164 N.W. 352, 358 (1917).*

Petitioner cites no case to the contrary. He relies instead solely on cases in which the releases were attacked on the grounds of fraud. Thus, the "direct conflict" which petitioner sees between the present case and other decisions under the Act is wholly illusory.

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* Since petitioner made no allegation that his financial circumstances prevented a tender of the consideration, he is not able to avoid the rule of these cases by invoking the exception sometimes recognized in such circumstances. See Rase v. Minneapolis, St. P. & S. M. Ry., 118 Minn. 437, 137 N.W. 176 (1912).

The distinction between fraud and mistake cases is a reasonable one. Where the attack on the release is based on mutual mistake of fact, the defendant is not alleged to be culpable in any way. On the other hand, where the defendant is charged with fraud, his demand for a return of the consideration can be rejected as an attempt to prevent a review of his own improper or unconscionable conduct. Moreover, a rule requiring return of the consideration in fraud cases can be disapproved as encouraging fraud upon employees protected by the Act. But good faith mistake of fact by its very nature cannot be fostered by such a rule; the employer-defendant in such cases does not contemplate that the release will operate as anything other than a fair means of compensation.

This distinction in the cases under the Act follows a similar distinction which has been recognized in common law cases. Courts have frequently held that when a release was challenged as void because of actual fraud, no return of the consideration would be necessary prior to suit, whereas if it were challenged as only voidable due to, for example, constructive fraud or mutual mistake of fact, the return of the consideration received would be a precondition to suit. *Pacific Greyhound Lines* v. *Zane,* 160 F. 2d 731, 735-36 (9th Cir. 1947) (applying California law); *McCarty* v. *Kendall Co.,* 242 F. Supp. 495 (W.D. S.C. 1965) (applying South Carolina law); *Watson* v. *Bugg,* 365 Mo. 191, 280 S.W. 2d 67, 69 (1955); *Picklesimer* v. *Baltimore & O. R.R.,* 151 Ohio St. 1, 84 N.E. 2d 214 (1949); *In re Clark's Estate,* 318 Mich. 92, 27 N.W. 2d 509 (1947); *Bonacci* v. *Massachusetts Bonding & Ins. Co.,* 58 Cal. App. 2d 657, 137 P. 2d 487, 491 (1943); *Frehe* v. *Schildwachter,* 289 N.Y. 250, 45 N.E. 2d 427 (1942);

Swan v. *Great No. Ry.*, 40 N.D. 258, 168 N.W. 657, 660-61 (1918).

Petitioner attempts to avoid the weakness of his position by assertions (*e.g.*, Pet., pp. 5, 7, 8) that the court below decided the question under Georgia law. The opinion of that court, however, clearly reveals the insubstantial nature of this charge: "The question posed in the present case is controlled by federal law" (Pet., p. 15).

Finally, petitioner apparently suggests, by his citation of *Duncan* v. *Thompson*, 315 U.S. 1, and *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U.S. 603, that Section 5 of the Federal Employers' Liability Act (45 U.S.C., Sec. 55) makes releases improper, or at least suspect. Neither case, however, involved a post-injury release for consideration. Moreover, this Court in subsequent cases has made it clear that "a release is not a device to exempt from liability [within the meaning of Section 5] but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Callen* v. *Pennsylvania R.R.*, 332 U.S. 625, 631. See also *Dice* v. *Akron, C. & Y. R.R.*, 342 U.S. 359.

CONCLUSION

Petitioner has failed to establish that there is any conflict of decisions on the issue presented in this case. The consistent decisions of both Federal and State courts on that issue indicate that there is no need for a decision by this Court to aid in the proper administration of the Federal Employers' Liability Act. The

petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005

JOHN D. JONES
C. RICHARD MCQUEEN
1240 Bank of Georgia Building
Atlanta, Georgia 30303

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No. 889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

HENRY HAROLD HOGUE, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

RESPONDENT'S MEMORANDUM CONFESSING ERROR

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005
Attorney for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 889

HENRY HAROLD HOGUE, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

---

RESPONDENT'S MEMORANDUM CONFESSING ERROR

This Court granted a writ of certiorari on January 28, 1968, to review a decision of the Georgia Court of Appeals, 116 Ga. App. 194, 156 S.E.2d 412 (1967), which held that a plaintiff under the Federal Employers' Liability Act who attacks a previously executed release on grounds of mutual mistake of fact must, as a condition to bringing his suit, tender back to his employer the consideration he received for the release.

In the petition for certiorari it was alleged that the decision of the Georgia court conflicted with other decisions under the F.E.L.A. In answering, respondent denied the alleged conflict, since the cases upon which petitioner relied involved attacks on a release based upon allegations of fraud, whereas his case rested upon an allegation of only mutual mistake of fact.

Respondent, while still of the opinion that the conflict alleged by petitioner does not exist, now believes, after further consultation with counsel, that its insistence before the Georgia courts that the applicable law required a tender, and the decision of the Georgia Court of Appeals requiring a tender were erroneous. Accordingly, respondent does not desire to offer brief or argument against petitioner on this issue, and confesses error. Respondent therefore invites the Court to examine the record and to vacate the decision below and remand the case for further proceedings. *Cates* v. *Haderlein,* 342 U.S. 804; *Metropolitan Bank* v. *Connecticut Mut. Life Ins. Co.,* 131 U.S. clxii. *Cf. Titmus* v. *Tinsley,* 370 U.S. 964.* Respondent will, of course, pay whatever costs may be assessed by the Court.

Respectfully submitted,

CHARLES A. HORSKY
701 Union Trust Building
Washington, D. C. 20005
Attorney for Respondent

---

* Georgia, like most other states, reverses decisions on appeal when the appellee confesses error. Turner v. Hardy, 198 Ga. 626, 32 S.E.2d 483, 491 (1944); 5B C.J.S. p. 348.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 889

HENRY HAROLD HOGUE,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF ON BEHALF OF HENRY HAROLD HOGUE

SAMUEL D. HEWLETT, JR.
Suite 1005 Healey Bldg.
Atlanta, Ga. 30303
Attorney for Henry Harold Hogue

OF COUNSEL:
HEWLETT & LEVY
Atlanta, Georgia

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 889

HENRY HAROLD HOGUE,

Petitioner,

versus

SOUTHERN RAILWAY COMPANY,

Respondent.

BRIEF ON BEHALF OF HENRY HAROLD HOGUE

This Court granted Certiorari to review the Judgment of the Court of Appeals of the State of Georgia entered in case No. 42869, *Southern Railway Company v. Henry Harold Hogue*. This Opinion has not been reported yet. The jurisdiction of this Court is by the granting of the petition for Certiorari to review the Court of Appeal of Georgia's construction of the Federal Employer's Liability Act, contained in Title 45 U. S. C. A., Section 51, and particularly Section 55. The Judgment of the Court of Appeals of Georgia was dated and entered June 28, 1967. The Petition for Rehearing was denied June 14, 1967. Petition for Certiorari to the Supreme Court of Georgia was denied on September 7, 1967. A stay of the issuance of the Mandate of the Court of Appeals was granted by the Court of Appeals in order for petitioner to apply for Certiorari to this Court. This Court granted Certiorari on January 22, 1968.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment of the Federal Constitution and provisions of the Federal Employer's Liability Act 35 Stat. 65 (1908) as amended, 45 U. S. C. 51 et sequa. The pertinent provisions being set out as Appendix "A".

QUESTIONS PRESENTED

In an action under 45 U. S. C. 51, et sequa of the Federal Employer's Liability Act where the carrier sets up a signed release by the employee as a defense, can the employee attack the release on the ground of mistake of fact and fraud, without first tendering back the money paid under the release.

Does not the decision of the Court of Appeals of Georgia deprive petitioner of his property rights under the Fourteenth Amendment of the Federal Constitution since such a decision deprives him of his right of action (a property right) which was specifically granted to him under a Federal Statute (45 U. S. C. 51, et seq.)?

STATEMENT OF CASE

The State Court Federal Employer's Liability Act Suit. On June 22, 1963, Henry Harold Hogue was employed by respondent Southern Railway Company to perform work on its trains and was injured while working in its shops in the furtherance of interstate com-

merce. He sued Southern Railway Company under the Federal Employer's Liability Act in the Superior Court of Fulton County, Georgia (A. 1).

To this suit, Southern Railway Company filed an answer, demurrers and a plea in bar setting forth a release given to respondent and signed by petitioner (A. 7, 11, 16, 30; R. 18, 34, 108).

Petitioner amended his action (A. 10, 20, 25) and filed an answer to the pleas in bar (R. 52), setting forth that the release was obtained by reason of a mistake of fact of both parties as to the extent of petitioner's injuries and alleging that petitioner and respondent had relied on the assurances of the carrier's doctor that he had only a bruised knee and was not permanently injured, whereas later it was determined that his injury was permanent and resulted in his having two operations, one of which caused him to lose his knee cap.

Petitioner alleged that under Federal law a release given under such circumstances was not a bar to his action, but the amount paid as consideration under such release would be deducted from any recovery, made by petitioner and credited to defendant.

Respondent filed demurrers to petitioner's petition as amended (R. 108; A. 30), such demurrers were overruled and a motion for summary judgment by respondent Railroad as to its plea in bar (R. 44) was denied (R. 120), by the trial court.

Respondent appealed to the Court of Appeals of Georgia alleging that the trial court erred in overruling its demurrers and in denying its motion for summary judgment and argued that petitioner's action could not be maintained because petitioner had failed to tender back the consideration of the release, and thus petitioner's action was barred.

Thereafter, the Court of Appeals of Georgia reversed the trial court holding that in an employee's action under Federal Employer's Liability Act, a release entered into between the employer and employee could not be attacked by the employee for mutual mistake unless the employee tendered back the consideration for the release (A. 32).

Petitioner's motion for a rehearing was denied (R. 150) and petitioner applied to the Supreme Court of Georgia for a writ of certiorari (R. 152) which was denied (A. 41).

This Court granted Certiorari on January 22, 1968.

ARGUMENT

This case involved Federally Created Rights under the Federal Employer's Liability Act, and it is of great public importance that the Supreme Court construe and decide the questions raised in this petition since there is no *direct* ruling by this Court on the question. The opinion of the Court of Appeals of Georgia, in effect, states that since the question has never been decided by this Court, they will decide the question un-

der Georgia law. This question could, and probably will, arise in courts throughout the entire United States, and should be decided by the Supreme Court of the United States since rights of railroad employees are jeopardized and the cases from different state courts are in conflict.

This Court stated in *Duncan v. Thompson*, 315 U. S. 1 (2 of opinion), 86 L. Ed. 575, 62 S. Ct. 422, that a contract between a carrier and its employee, requiring the return of consideration paid under the contract before suit could be filed and maintained was a contract, the purpose and intent of which was to enable the employer to exempt itself from liability under the Federal Employer's Liability Act, and therefore was to that extent void.

In *Dice v. Akron, C & Y. R. Co.*, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312, this Court held that Federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act.

Petitioner contends that the pleading, by the carrier-employer, of a release given by its employee and the employer's contention that such release could not be attacked unless the employee first tendered back the consideration of the release, is such a device as is prohibited under 45 U. S. C. Section 55.

This Court held in *Philadelphia B & W. R. Co. v.*

Shubert, 224 U. S. 601, 56 L. Ed. 911, 916 (construing Section 5 of the Federal Employer's Liability Act; 45 U. S. C. 55) that necessarily the liability must survive the acceptance of the benefits, or there could be no recovery and hence no set off.

The Court went further and said:

> "The words 'the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The purpose and intent of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."

Where, as in this case, an employer pleads a release as a bar to an action by its employee for injuries, but contends further that under state law, no attack can be made on the release, since there was no tender back of the consideration of the release, and thus the employee's suit should be dismissed, the employer is using state law as a device whereby its liability to its employee is defeated.

The holding of the Court of Appeals of Georgia, that, since no tender back of the consideration of the release was made, no attack could be made on the release and the employee's suit should be dismissed, is an attempt by a state to declare what defenses can be

interposed to rights granted under the Federal Employer's Liability Act.

Such ruling is in direct conflict with the interpretation placed on 45 U. S. C. 55 by various Federal courts in different circuits and by state courts as follows:

Irish v. Central Vermont R. Co., 164 F. 2d 837 (4) 2nd Circuit:

> "A contract not to sue on claim within Federal Employers' Liability Act could by virtue of provisions in the Act be repudiated for fraud without a tender of consideration received."

Bowman v, Illinois Central Ry. Co., 132 N. E. 2nd 558 (5) (affirmed by Illinois Court of Appeals and by its Supreme Court, certiorari denied by United States Supreme Court (on another point), and holding that 45 U. S. C. Section 55 was enacted to prevent an employer who has received a release from its employee to assert return of the consideration as a condition precedent to employee's right to attack the release as a bar to the employee's action against the employer under 45 U. S. C. 51 et sequa.

Marshall v. New York Central R. Co., 218 F. 2d 900 (6) 7th Circuit, holding that where a release was obtained by fraud and misrepresentations, the employee was not required as a prerequisite to her right to maintain an action under the Act to make restitution of the amount which was received as consideration for the release.

Humphrey v. Erie R. Co., 116 F. Supp. 660 (S. D. of N. Y.) citing *Irish v. Central Vermont R. Co.*, 164 F. 2nd 837 (4) p. 667 n. 14, holding petitioner's action was not barred by reason of his failure to return the consideration of the release.

Johnson v. Elgin J. and E. Ry. Co., 87 N. E. 2d, 567 (3), holds that a tender of the consideration of a release given by an employee to his employer is not a prerequisite to the commencement of an action under the Federal Employer's Liability Act. Also see:

Guy v. Cincinnati Northern R. Co. (Mich.), 166 N. W. 667 (3) certiorari denied 246 U. S. 668, 62 L. Ed. 930.

There is no question but that, both under Federal and Georgia Law, a release may be set aside for fraud or mistake of fact, thus the primary questions here are:

1. Whether the return of the consideration for a release is a prerequisite to an employee's maintenance of his action under the Federal Employers' Liability Act?

2. If such a return of the consideration is *not* required under the Act, then did not the ruling of the Court of Appeals of Georgia deprive petitioner of his right of action (a property right) in violation of the Fourteenth Amendment of the Federal Constitution?

It is petitioner's contention that there can be no doubt that petitioner has been deprived of his property

right in his cause of action by the ruling of the state courts, and that the state action is a violation of the Fourteenth Amendment of the United States Constitution in view of the fact that the court applied state rules of law (instead of Federal law), which deprive him of the benefits given him under the Federal Employers' Liability Act.

That a state may not set at naught benefits granted by Federal statute is set out in a well reasoned opinion as follows:

In *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827, 830, the court held, citing from *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U. S. 173, 176, 87 L. Ed. 165:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad (Co.) v. Tompkins, 304 U. S. 64 (58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487). There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law (citing cases)."

See also Restatement of the Law of Contracts, Section 480, page 831:

"When Offer to Return Performance Received Is a Condition of the Power to Avoid."

2. A failure to return or offer to return performance received in accordance with the rule stated in subsection (1) does not preclude avoidance if the performance . . ."

"(c) is merely money, the amount of which can be credited in partial cancellation of the injured party's claim . . ."

"the plaintiffs are not barred from asserting fraud by their failure to tender back the consideration of the release."

Petitioner contends that Congress having preempted the field of relations between carriers and their employees has provided equitable protection for an employer by allowing any consideration paid to be deducted from any judgment obtained by the employee; and provided protection to the employee by prohibiting the employer from using any device which would defeat his liability to his employees for injuries received when an action is brought under the Federal Employer's Liability Act.

CONCLUSION

Petitioner, in conclusion states that any other construction of Section 55 would be contrary to legislative intent and would open the door for the perpetuation of fraud upon the employee and the creation of injustice because of the fact that an employee has relied upon a company doctor to whom he was sent by the carrier. The representations by the company doctor and the railroad's agents would be the basic reasons for an employee being induced to settle a claim. Later, after the employee has ascertained the fact that his injuries were permanent, the carrier could assert that the employee must refund any money before he would be permitted to proceed with the claim which was not the intention of our Congress. The employees were intended to be protected where they relied in good faith upon the representations of the carrier. The carrier, under all circumstances, would receive the credit to which it would be entitled on any money that it paid to the employee.

RESPECTFULLY SUBMITTED,

SAM D. HEWLETT, JR.
Attorney for Petitioner

1005 Healey Building
Atlanta, Georgia 30303
522-8441

CERTIFICATE OF SERVICE

I, Samuel D. Hewlett, Jr. do certify that the foregoing Brief on Behalf of Appellant was served on the defendant by serving its attorney, John D. Jones, Esquire, Green, Buckley, DeRieux, Moore & Jones, 1240 National Bank of Georgia Building, Atlanta, Georgia, by furnishing them a copy through the United States Mail with proper postage thereon.

This ____ day of _____, 1968.

_____

Attorney for Petitioner

APPENDIX "A"

45 U. S. C. Section 51

Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the State and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employees, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way direct-

ly or closely or substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; August 11, 1939, c 685, Sec. 1, 53 Stat. 1404

* * * *

Sec. 55. Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void; *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. April 22, 1908, c. 149, Sec. 5, 35 Stat. 66.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

HOGUE *v.* SOUTHERN R. CO.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 889. Decided April 1, 1968.

PER CURIAM.

We granted the petition for certiorari in this case over the opposition of the respondent carrier. 390 U. S. 903. The writ presents for review a judgment in favor of the respondent carrier entered by the Georgia Court of Appeals upon a holding that a plaintiff under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* who attacks a previously executed release on grounds of mutual mistake of fact, must, as a condition to bringing his suit, tender back to his carrier employer the consideration he received for the release. 116 Ga. App. 194, 156 S. E. 2d 412, certiorari denied by the Supreme Court of Georgia. Respondent carrier has now filed before argument a "Memorandum Confessing Error" which states ". . . that its insistence before the Georgia courts that the applicable law required a tender, and the decision of the Georgia Court of Appeals requiring a tender were erroneous. Accordingly, respondent does not desire to offer brief or argument against petitioner on this issue, and confesses error."

Petitioner had suffered an injury to a knee while working in respondent carrier's shops. He executed a release for a consideration of $105, and did not offer to return the consideration before instituting this action. He pleaded that the release was obtained by reason of a mistake of fact of both parties as to the extent of his injuries, alleging specifically that he and the carrier had relied on the assurances of the carrier's doctor that he had only a

bruised knee and was not permanently injured, whereas later it was determined that his injury was permanent and resulted in his having two operations, one of which caused him to lose a knee cap.

The question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361. We reject the suggestion that a tender back of the consideration is excused only where fraud enters into the execution of the release. See, *e. g.*, *Graham* v. *Atchison, T. & S. F. R. Co.*, 176 F. 2d 819, 826. We hold that a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries. We have held that an express agreement of an injured employee who obtained funds from a carrier to help defray living expenses first to return the sum paid as a prerequisite to the filing and maintenance of an action under the FELA was void under § 5 of the Act.* *Duncan* v. *Thompson, Trustee*, 315 U. S. 1. There is no occasion to decide whether the release here involved violated § 5. It is sufficient for the purposes of this decision to note that a rule which required refund as a prerequisite to institution of suit would be "... wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently in-

*Section 5, 45 U. S. C. § 55, is as follows:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

flicted by their employers." *Dice* v. *Akron, C. & Y. R. Co.*, *supra*, at 362. Rather it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee. Cf. *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, upon consideration of the confession of error filed here by the respondent and in light of the record, would vacate the judgment of the Court of Appeals of the State of Georgia and remand the case for further appropriate proceedings.